

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JERMEL WALKER**

Claimant

VS.

**CITY OF TOPEKA**

Self-Insured Respondent

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Docket No. 1,052,463

**ORDER**

Claimant appeals the March 21, 2011, Preliminary Hearing Order of Administrative Law Judge Rebecca Sanders (ALJ). Claimant was denied benefits after the ALJ found that claimant had failed to sustain his burden of proving that he suffered personal injury by accident arising out of and in the course of his employment with respondent.

Claimant appeared by his attorney, Roger D. Fincher of Topeka, Kansas. Respondent appeared by its attorney, Sandra M. Sigler of Topeka, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held December 22, 2010, with attachments; the transcript of Preliminary Hearing held February 18, 2011, with attachments; the deposition of Herman Wyatt taken March 9, 2011; and the documents filed of record in this matter.

**ISSUE**

Did claimant suffer personal injury by accident which arose out of and in the course of his employment with respondent? Claimant alleges that on July 27, 2010, he bent over in his car to pick up some papers for work when he suffered sudden back pain. Claimant had spent two days the week before pulling driftwood from the river while performing his normal job for respondent. Respondent contends that claimant suffered a sudden onset of back pain as he was exiting his vehicle in respondent's parking lot, before claimant had started his normal workday.

**FINDINGS OF FACT**

After reviewing the record compiled to date, the undersigned Board Member concludes the Preliminary Hearing Order should be affirmed.

Claimant was employed by respondent as a maintenance worker at its water department plant, starting with respondent on March 7, 2005. One of his duties for respondent involved pulling driftwood from the river. During the week ending on July 23, 2010, claimant had spent two days at the river raking driftwood. Claimant testified at the December 22, 2010, preliminary hearing that he told Joe Patterson, his foreman, that he had a sore back after the raking incidents. Claimant then spent approximately 36 1/2 hours over the following weekend repairing water mains. Claimant then took Monday, July 26, 2010, as a sleep day to recover from the busy weekend. Claimant testified that on July 27, 2010, after reporting to work, he went back out to his car to get hazmat material to be placed on his desk. As he straightened up, his back went out and claimant experienced such significant pain that he was forced to lie down in the parking lot. A co-worker, Randy Breymeyer, saw claimant in the parking lot, and claimant's supervisor, Charlie Shinn, was informed. Claimant testified that he requested the day as a sick day. However, respondent's exhibit H from the preliminary hearing indicates that claimant worked for 5 hours on July 27, 2010. The next day, claimant took as a sick day. Then on July 29, claimant went to the emergency room at St. Francis Medical Center (ER). Claimant was given pain medications and did not return to work for respondent until November 18, 2010. Claimant was provided work restrictions, but was unable to return to work until that time. At the time of the preliminary hearing, claimant was still experiencing back pain and pain into his leg, and his feet would go numb.

At the time of the original injury, claimant was told to talk to Cindy Fitchpatrick to fill out an accident report. The report, marked as respondent's exhibit A to the preliminary hearing, indicated that claimant was getting out of his personal vehicle reporting to work when his back went out. The report indicated that this was a reoccurrence of a previous back injury. Claimant had suffered a back injury on April 1, 2009, when he was placing two rolls of toilet paper on a shelf. That matter remained in litigation at the time of the preliminary hearing.

Ms. Fitchpatrick testified at the preliminary hearing that she had been contacted by Mr. Shinn about the need to fill out an accident report for claimant, as claimant was going to the ER. The information on the accident report came from claimant. The form was completed on July 29, 2010, with an accident date noted as July 27, 2010. Claimant told her that he was reporting to work and his back went out as he was getting out of the car. Claimant went on to say that this happened to him from time to time and he would just lie down. Claimant advised her that this was a reoccurrence of a previous back injury. Ms. Fitchpatrick noted that the form listed Tim Davis as the person who filled out the

information. She testified that she was to complete the form and then the supervisor signed it. She denied being told that claimant had come to work and was returning to his car to retrieve materials. She was just told that claimant was getting out of his car when his back went out. Ms. Fitchpatrick testified that claimant was to report to work at 7:00 a.m. There are no clocks to punch; only time sheets to be turned in by the employee. Claimant would have to use a security card to get into the front gate.

The preliminary hearing was continued to February 18, 2011, with the parties to take added testimony by deposition. Charles Shinn, claimant's supervisor, testified that he was first made aware of claimant's problem the morning of July 27, 2010, when Mr. Brey Meyer advised that claimant was down beside his car. When Mr. Shinn talked to claimant, he was advised by claimant that this was a preexisting thing and he was going to try to stick it out at work. Claimant did work for 5 hours that day pulling driftwood from the East intake. The next morning, July 28, 2010, claimant called in sick, and actually took a sick day. The morning of July 29, claimant called in claiming that he was hurting and needed to go to the ER. Mr. Shinn requested that claimant go by the distribution center and fill out the necessary paperwork when he was done at the ER. Claimant did not report that he suffered an injury while pulling driftwood from the river or while getting papers out of his car. Mr. Shinn did testify that claimant fell in the parking lot prior to claimant's 7:00 a.m. start time. Mr. Brey Meyer came to Mr. Shinn's office right at 7:00 a.m. and reported the problem.

Mr. Brey Meyer, a co-worker of claimant, testified that when he arrived at work the morning of July 27, 2010, he saw claimant in the parking lot, just getting up from the ground. Claimant appeared to be in pain. Claimant said that he was having back pain. This would have been before 7:00 a.m., but the exact time was not clear. Mr. Brey Meyer reported claimant's problem to Mr. Shinn. Neither Mr. Shinn nor Mr. Brey Meyer were aware what Hazmat forms claimant would have had in his car.

Joseph Patterson, respondent's maintenance foreman, testified regarding claimant's work activities leading up to July 27, 2010. He acknowledged that claimant advised him on July 23, 2010, after pulling driftwood, that his back was sore. No specific injury was discussed. This was not the first time that claimant had complained of a sore back. He acknowledged that claimant worked extensive overtime over the weekend and took a sleep day on Monday, July 26, 2010. When claimant worked the 5-hour job on July 27, 2010, he did not mention his back to Mr. Patterson. Mr. Patterson was told by another employee, Jerry Nolte, that claimant was in the parking lot lying beside his car. Later that day, Mr. Patterson discussed the matter with claimant and was told that claimant's back went out. The Application For Hearing, Form K-WC E-1 (E-1), filed in this matter alleges a date of accident on July 27, 2010, with the cause being "pulling drift wood [sic] off water". The ALJ noted that the only part of claimant's testimony corroborated by his co-employees was the fact that he was lying in the parking lot next to his car before work on July 27, 2010. The ALJ found that claimant had failed to prove that he suffered an accidental injury which

arose out of and in the course of his employment with respondent. Preliminary benefits were denied.

### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>2</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>3</sup>

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."<sup>4</sup>

Claimant alleges that he suffered an accidental injury on July 27, 2010, while pulling driftwood from the water. However, claimant clearly displayed back problems the morning of July 27, 2010, before he ever began working. Several witnesses, including claimant himself, testified that claimant was lying next to his car, experiencing back pain before 7:00 a.m. on July 27, 2010. The ALJ found claimant's allegations of a work-related injury later that day to not be credible. This Board Member agrees, especially considering the

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<sup>1</sup> K.S.A. 2010 Supp. 44-501 and K.S.A. 2010 Supp. 44-508(g).

<sup>2</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>3</sup> K.S.A. 2010 Supp. 44-501(a).

<sup>4</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

fact that claimant worked for 5 hours on July 27, pulling driftwood without complaint. The denial of benefits is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>5</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

### **CONCLUSIONS**

Claimant has failed to prove that he suffered personal injury by accident on July 27, 2010, while working for respondent. His pain that morning appeared to be from a preexisting condition. Whether claimant suffered an aggravation of a preexisting condition from prior work was not claimed. The denial of preliminary benefits is affirmed.

### **DECISION**

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the Preliminary Hearing Order of Administrative Law Judge Rebecca Sanders dated March 21, 2011, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May, 2011.

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HONORABLE GARY M. KORTE

c: Roger D. Fincher, Attorney for Claimant  
Sandra M. Sigler, Attorney for Respondent  
Rebecca Sanders, Administrative Law Judge

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<sup>5</sup> K.S.A. 44-534a.